No. 246

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SUPREME COURT OF THE UNITED STATES.

Filed April 23, 1902.

OCTOBER TERM, 1901.

No. 246.

J. M. ROBINSON & CO.,
Plaintiffs in Error,

vs.

J. C. BELT AND C. M. KING,
Defendants in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT, BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

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IN THE

SUPREME COURT OF THE UNITED STATES.

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Plaintiffs in Error,

vs.

J. C. BELT AND C. M. KING,
Defendants in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT FOR PLAINTIFFS IN ERROR.

On December 29th, 1891, the defendant in error, John C. Belt, who was engaged in business in the Indian Territory, executed there to his co-defendant in error, C. M. King, a deed of assignment for the benefit of creditors. Very shortly thereafter a large number of his creditors, including J. M. Robinson & Co., the plaintiffs in error, sued him by attachment in the United States Court in that territory, First Judicial Division, and their writs of attachment were levied concurrently on the property conveyed by the deed of assignment. Shortly thereafter the defendant in error, C. M. King, filed an interplea for

the attached property in the suit of J. M. Robinson & Co., this proceeding being had under and by virtue of Sections 356, 357 and 358 of Mansfield's Statutes of Arkansas. After so doing, he entered into a stipulation with the other attaching creditors (Printed Record pp. 21, 22), whereby it was agreed that this interplea should be considered as filed in every suit, and, virtually, that the result of the interpleader proceedings in the suit of J. M. Robinson & Co. should control all other suits. The property was, after its attachment, sold under the order of the Court pursuant to statutes governing the proceeding, and at such sale realized the sum of $7,900.00.

In his interplea King sets forth *verbatim* the deed of assignment under which he claims. Under that deed the creditors are divided into four classes, and three of these classes are preferred and given priority of payment in successive order; but each preference is on the condition, that the preferred creditors should, within ninety days, agree to accept all dividends to which they might severally be entitled under the deed "in full satisfaction and discharge of their respective claims against the said John C. Belt; and execute and deliver to the said John C. Belt a legal release therefor." The fourth class provided for by the deed included all remaining creditors, and such of the preferred creditors as should refuse or fail to comply with this condition; and the deed provides that the creditors included in this class should receive any residue of the proceeds of the assigned property after the satisfaction of the preferences. (Printed Record, p. 6.)

The trial of the interplea was had before a jury. It resulted in a verdict in favor of the interpleader, which found the attached property to be the property of the interpleader, and further set forth that the proceeds arising from the sale of the property

amounted to $7,900.00 (Printed Record, p. 59). Thereon the judgment hereinafter referred to was entered by the trial court. This judgment was subsequently affirmed, first, by the Court of Appeals for the Indian Territory, whose opinion will be found at pages 61 to 67 of the printed record, and then by the United States Court of Appeals for the Eighth Circuit, whose opinion is set forth at page 74 of the printed record. Subsequently a writ of error was sued out by J. M. Robinson & Co. from this Court.

The first question which will be presented to this Court on this hearing will be that of the validity of the deed of assignment hereinbefore referred to, the claim of its invalidity being based upon the condition requiring the preferred creditors to accept dividends in full satisfaction of their respective claims and to execute releases of those claims. This question is plainly raised by objections to the reception of the deed in evidence (Printed Record, pp. 24, 25), and by request of J. M. Robinson & Co. for a direction to the jury to find for them (Printed Record, pp. 49 and 56); and also by the request of an instruction by J. M. Robinson, which was as follows:

> "The Court instructs the jury that there is no evidence in this case to sustain the claim of the interpleader, and you will find your verdict in favor of the plaintiff, J. M. Robinson & Co." (Printed Record, p. 56);

and the question also arises under the instructions given by the trial court to the jury. At the same time, it should be observed that the particular objection to the deed, which we intend to present in this brief, was not considered by either of the appellate courts before which the cause was heard, but that their attention was directed to the question, whether the deed was void as a partial assignment

with a requirement for a release, it being held, or assumed, that the law of Arkansas, which permits a requirement for a release in a general assignment, but not in a partial assignment, controls.

Aside from the question alluded to, we intend to maintain that the evidence is insufficient to establish the priority of the deed of assignment over the attachments. No evidence whatsoever was adduced at the trial of any acceptance of, or assent to, the deed of assignment by any creditor of John C. Belt prior to the levy of those attachments, nor, indeed, at any time, whether before or after those attachments; there is not even an allegation in the interplea of any such acceptance or assent prior to the attachments, though there is an allegation, but, as we have just stated, no evidence, of an acceptance by some of the creditors prior to the filing on May 31, 1892, of the amended interplea by King (Printed Record, pp. 15, 16).

In addition to the foregoing matters, but one other contention will be advanced by us, and that relates to the nature of the remedy and judgment to which the plaintiff was entitled.

That contention arises under facts which are correctly stated in the opinion of the Court of Appeals for the Indian Territory (Printed Record, page 61), as follows:

> "The property attached was sold by order of Court, and proceeds paid into court, before the interplea was filed. At the May term, 1892, a demurrer to the interplea was filed and sustained by the Court, from which order King sued out a writ of error to the U. S. Court of Appeals. King gave no *supersedeas* bond, and the fund was by order of Court distributed *pro rata* to the attaching creditors according to their priorities. The fund had been deposited in a bank, designated as a U. S. depository. The bank failed, and only eighty-seven per cent. of the fund was recovered and distributed.

The fund amounted to $7,900.00. The Court of Appeals reversed the judgment on the demurrer, and on Sept. 19, 1895, the appellants filed their answer to the interplea, denying that King was owner by virtue of the deed of assignment, and alleging that the deed of assignment was fraudulent and void."

It thus appears that, when the judgment, to which the present writ of error is addressed, was rendered by the trial court, namely, September 28, 1895, all the proceeds of the attached property had been distributed among the attaching creditors under a prior order of the Court, and that the Court then had nothing in its custody or charge, or under its control, other than a claim of $1,027.00 against the defunct bank.

Under these circumstances the Court, upon the verdict hereinbefore set forth entered a judgment.

"That the said C. M. King, interpleader, have and recover of and from J. M. Robinson & Co., and the said above-named plaintiffs mentioned in said stipulation (reference is here made to the stipulation mentioned *ante* page 2), the sum of seven thousand nine hundred ($7,900.00) dollars, as per said stipulation and agreement, together with the costs of this suit. And it further appearing to the Court from the record and evidence submitted that the proceeds of the sale of the property in this case were deposited by the Clerk of this Court in the First National Bank at Arkansas City, Kansas, and that such bank thereafter suspended payment, and that by reason of such suspension only 87 per cent. of such funds were withdrawn from said bank, leaving a balance therein of 13 per cent. of the original proceeds, amounting to the sum of $1,027.00, subject to the order of this Court.

"And whereas, it further appearing that nearly the whole amount of the balance of such proceeds amounting to the sum of $6,473.62 were paid to plaintiffs and received by them on the 1st day of March, 1894, and

were shared among themselves in the following proportion and amounts, viz: (The court here sets forth the names of the attaching creditors and the amounts previously paid to each under the order of distribution.)

"It is therefore considered and ordered by the Court that the Clerk of this Court is hereby directed to withdraw and collect from First National Bank at Arkansas City, Kansas, the above mentioned amount of proceeds remaining due therefrom, and that the said plaintiffs are hereby ordered to pay and refund to this Court the said amounts of money, respectively received by them, within ninety days from this date; any and all of such sums of money collected or paid into court in compliance with this order shall be paid by the Clerk of this Court to said C. M. King, the interpleader herein.

"To all of which plaintiffs except, and pray an appeal, which is allowed, and plaintiffs are allowed forty days in which to file a bill of exceptions." (Printed Record, pp. 22 and 23.)

It thus appears that by its judgment the trial court undertook to do three things, namely:

1. To render a *personal* judgment for the sum of seventy-nine hundred dollars, being the amount of the entire proceeds of the sale of the property in controversy, not only against the plaintiffs in error, J. M. Robinson & Co., but also against the other attaching creditors;

2. To order plaintiffs in error, and the other attaching plaintiffs, to pay and refund to the court the amounts paid to them respectively under the prior order of distribution, the amounts so paid to them respectively being set out in the judgment; and

3. To order the Clerk of the Court to withdraw and collect from the First National Bank at Arkansas City, Kansas, the depository which had failed, the

thirteen per cent. of the proceeds of the property in controversy which remained due from that bank.

We shall contend that this judgment is erroneous, principally because of the entry of a personal judgment against the plaintiffs in error, J. M. Robinson & Co.; but we shall also maintain that it was erroneous because it included persons who were not parties to the cause, and because it gave various remedies without confining the interpleader to one satisfaction.

The foregoing contentions with regard to the effect of the deed of assignment are presented by the following rulings of the trial court, namely:

1. The overruling by the trial court of a motion by plaintiff in error that the jury should be instructed to find for them. (Printed Record, p. 56.)

2. The refusal by the trial court of the instruction below set forth, which was requested by the plaintiffs in error. (Printed Record, p. 56.)

It follows from the foregoing that the following assignments of error, set forth on pages 78 and 79 of the printed record, and the numbered respectively, tenth, twelfth, thirteenth, fourteenth and seventeenth, will be relied upon in our argument:

> "Tenth. In refusing to instruct the jury as follows:
>
> "The court instructs the jury that there is no evidence in this case to sustain the claim of the interpleader, and you will find your verdict in favor of the plaintiff, J. M. Robinson & Co."
>
> "Twelfth. In refusing, after all the testimony was in, to instruct the jury to return a verdict for the plaintiff."
>
> "Thirteenth. In rendering judgment herein that C. M. King, interpleader, have and recover of and from said J. M. Robinson & Co. the sum of $7,900.00 as per the stipulation and agreement mentioned in said judgment."
>
> "Fourteenth. In rendering judgment herein that said C. M. King, interpleader, have and recover of

and from J. M. Robinson & Co. and plaintiffs mentioned in said stipulation, said sum of $7,900 as per said stipulation and agreement."

"Seventeenth. In rendering judgment herein against said J. M. Robinson & Co. and said plaintiffs mentioned in said stipulation for said sum of $7,900, and at the same time ordering said several plaintiffs to repay and refund to the court the said amounts of money received by them respectively, and at the same time ordering the clerk of the court to withdraw and collect from said First National Bank at Arkansas City, Kansas, said sum of $1,027."

ARGUMENT.

I.

The deed of assignment involved in the case at bar was invalidated by the requirement therein for the release of debts, and, therefore, the trial court erred in refusing to instruct the jury to find in favor of the plaintiffs in error, and also in refusing to instruct the jury that there was no evidence to sustain the claim of the interpleader.

The first question which will arise on this hearing is that of the validity of the deed of assignment for the benefit of creditors under which the defendant in error, King, claims in his interplea. That the question resolves itself into two inquiries, namely (1), the controlling effect of the decisions in Arkansas, upon which the conclusions of the Court of Appeals for the Eighth Circuit depend, and (2) the proper conclusion to be reached, independently of those decisions.

These inquiries we will proceed to follow in their inverse order, that is, we shall first take up the inquiry as to the effect which ought to be given to this assignment of error on the hypothesis that this Court is free to form and follow its own judgment, uncontrolled by the decisions of Arkansas, and we shall then proceed to show that such freedom of action exists.

The question of the validity of an assignment for the benefit of creditors, which provides for preferences among creditors on the condition of the release of any unpaid balances of the preferred claims, arose in the early days of our republic. No rule of public policy had had time to formulate itself, and the laxity of existing conditions appears to have influenced the course of judicial decision. It had become the practice in some of the States to make conditional assign-

ments with requirements for releases, and the courts were indisposed to override it. In one or more of the decisions the view was expressed that the validity of the requirement had been recognized in England by *The King v. Watson*, 3 Price, 6; but this view is discountenanced by the recent decision in *Duggan v. Bliss*, 4 Colo. 226, and other cases, and cannot be reconciled with the ruling which now prevails in England. *Spencer v. Slater*, 4 Q. B., Div. 13. Indeed, the practice is properly ascribed by an early judicial opinion to the "*astutia Americana*" in the warehousing of effects of debtors (*Lippincott v. Barker*, 2 Binn. 191, decided in 1809).

In great part through judicial deference to practices which had come into vogue in the community, the validity of the requirement under consideration came to be recognized in Alabama, Pennsylvania, Virginia, South Carolina, Maine, New Hamsphire, Maryland and Rhode Island. But this was not accomplished, even in these States, without conflict of opinion and even of decision. To what extent that conflict existed, we do not feel called upon to consider. It is of greater importance that courts, which, in deference to prevailing practices and conditions, sustained assignments of this character, afterwards recognized the fallacy of their ruling, and regretted their inability, under the doctrine of *stare decisis*, to change it.

Said the Supreme Court of Alabama, in 1839, in *Ashursts v. Martin*, 9 Porter, pp. 572–573:

> "If this question could be considered open in this State, we *should not hesitate* to decide, on principle, that such a stipulation in a deed of assignment would be a manifest violation of the statute of frauds; and such too we consider at the present day to be the weight of authority on an examination of the adjudged cases."

In like strain the Supreme Court of Pennsylvania, in 1834, remarked in *Livingston v. Bell*, 3 Watts, p. 201:

> "Though it would have been better had these conditional assignments been brought within the purview of the *13 Eliz.*, as they might have been originally, and, in fact, have been in some of our sister States, it is too late to do so now."

Similar, though not so pronounced, was the following language of the Supreme Court of Virginia in *Phippen v. Durham*, 8 Gratt, p. 464:

> "If the question were *res integra* * * * I would be inclined to answer it in the negative. While the many cases on this subject are conflicting, I think the preponderance is against the validity of such a deed."

It is, therefore, not surprising that a leading work upon this subject, in commenting on the question now being considered, should remark:

> "Wherever such an assignment has been sustained, it has been against the sound conviction and judgment of the courts, and with a constant expression of regret that a doctrine at variance with equity and with morals must be maintained upon the prevailing understanding of the public."
>
> *Bump on Fraudulent Conveyances*, 4th Ed., Sec. 420, p. 437.

But, if courts did not undo the ruling, which was opposed to their better judgment, they nevertheless limited and qualified it by holding that the condition for a release was permissible only in a general and not in a partial assignment (*Thomas v. Jenks*, 5 Rawle. 221; *Green v. Trieber*, 3 Md. 11; *Gadson v. Carson*, 9 Rich. Eq. 252; *Gordon v. Cannon*, 18 Gratt 387; *Rankin v. Loder*, 21 Ala. 380; *Nightingale v. Harris*, 6 R. I. 321); and some cases even went to the extent of holding that the conditional assignment was in-

valid, unless it appeared upon its face to be a conveyance of all the property of the assignor (*Barnitz v. Rice*, 14 Md. 24).

To us it seems that this qualification is not consistent with the theories underlying the original ruling, which were that the debtor was entitled to exercise dominion over his own property by creating preferences, and that, since every creditor was at liberty to give or refuse a release as he chose, the provision for a release was not coercive. These theories seem to us to be just as applicable to partial assignments as to general assignments, since the debtor's right of dominion over a part of his property is the same as that over his entire property, and since a release in the one case would be just as voluntary as in the other. However, the practical and substantial difference between the equities in the two cases outweighed mere matter of logic; and inconsistency of ruling is to be expected from a tribunal which is at war with itself, and which feels called upon to administer a ruling to which it is at heart opposed.

Nor did the opposition to a condition for a release in assignments stop with limitations of the rulings of the Court in those States in which the validity of the condition had been recognized. The Legislatures in Maine, New Hampshire, Pennsylvania, Vermont and Alabama undid what the courts had not the courage to undo (*Pearson v. Crosby*, 23 Maine, 261; *Hurd v. Silsby*, 10 N. H. 108; *Perry Ins. Co. v. Foster*, 58 Ala. 502; *Burrill on Assignments*, 6th Ed., secs. 159 and 161.)

We have called attention to the course of judicial and legislative action in the States, in which the condition under consideration has been sustained, with a view to showing that the precedents there established are not calculated to win adherence or sup-

port; nor did they win either. In every other State in which the question has arisen, with the single exception of Arkansas, the courts have vigorously assailed the insolvent debtor's right to exact a release in an assignment for the benefit of his creditors, and have declared assignments of that character fraudulent and void. We content ourselves with the citation of a single authority from each of the jurisdictions, in which this has been done.

Wakeman v. Groves, 4 Paige 23; 11 Wend. 187;
Hubbard v. Naughton, 43 Mich. 220;
Miller v. Conklin, 17 Ga. 430;
Ingraham v. Wheeler, 6 Conn. 277;
Duggan v. Bliss, 4 Colo. 226;
Brown v. Knox, 6 Mo. 302;
Conklin v. Carson, 11 Ill. 503;
Greeley v. Dixon, 21 Fla. 412;
Sperry v. Gallaher, 77 Iowa, 107;
Atkinson v. Jordan, 5 Ohio, 293;
Wilde v. Rawlings, 1 Head (Tenn.) 34;
Ware v. Wanless, 2 Wyom. 144;
Hafner v. Irwin, 1 Ired. (Law) 490.

Various grounds are assigned by these authorities as the basis of their ruling. They are substantially that the insolvent by his requirement for a release coerces his creditors, dictating his own terms and making a bankruptcy law for himself. To use the expression employed in *Grover v. Wakeman*, 11 Wend. 200, and quoted with approval by other judges, the provision is obnoxious, because it enables the debtor "to operate upon the fears of his creditors and coerce them into his own terms." The same is pithily expressed in *Ingram v. Wheeler*, 6 Conn., p. 283, as follows:

> "No insolvent debtor has the right to prescribe terms to his creditors, to say to these, 'take up these crumbs on my own terms, or have nothing.'"

The requirement is repugnant to our moral sense, as well as to legal principle and authority.

> "It is often said that this is 'coercive,' 'repressive,' and unjust, and so it is. But the better way of putting it is that it is fraudulent. It is fraudulent in the plainest sense."
>
> *Bigelow on Fraud*, Vol. 2, p. 282.

And says Mr. Bump in his work on Fraudulent Conveyances (4th ed.), p. 434, section 415, after first condemning the condition from a legal standpoint:

> "The injustice and impropriety of such an effort on the part of the debtor must, moreover, shock the moral sense, and its fraudulent design and effects upon the rights of those creditors who refuse to release are obvious."

The validity of an assignment requiring a release came before this Court in *Brashear v. West*, 7 Pet. 615; and, while the assignment was there held valid, this was done with considerable reluctance, and only because the rulings in Pennsylvania, where the assignment was made, were deemed obligatory. "We are far from being satisfied," says this Court through Chief Justice Marshall, "that upon general principles such a deed ought to be sustained." And many authorities upon the subject treat this case as an authority against the legality of the character of conveyance under consideration. In consonance with that view of it *Burrill on Assignments* (6th ed.), sec. 163, p. 212, concludes its observations as follows:

> "Taking into consideration the opinion expressed by Chief Justice Marshall in Brashear v. West, it seems probable that, should a case be brought before the Supreme Court of the United States *which could be decided on general principles*, and free from the controlling influence of said construction, *the decision would be against the right to stipulate*."

And this expectation receives direct warrant from the recent utterances of this Court in *Security Trust Co. v. Dodd*, 173 U. S., pp. 633-634, wherefrom the following extract is taken:

> "An assignment containing a provision of this kind would have been in many, perhaps in most, of the States void at common law. (Citing authorities.) * * * In *Brashear v. West*, 7 Pet. 608, an assignment containing a provision of this kind was upheld with apparent reluctance upon the ground that in Pennsylvania, where the assignment was made, it had been treated as valid."

We are confident that these authorities, as well as the legal principles underlying the subject, will lead this Court to declare the assignment in controversy invalid, unless the decisions of the Supreme Court of Arkansas are controlling; and, therefore, we pass to a brief statement of these decisions, and the consideration of their effect.

The legality of an assignment with a requirement for the release of the assignor was first decided by the Supreme Court of that State in *Clayton v. Johnson*, 36 Ark. 406, wherein the assignment was sustained. Shortly thereafter the question again arose in *McReynolds v. Dedman*, 47 Ark. 347, wherein the assignment was declared fraudulent, because it provided for the payment of the surplus to the assignor to the exclusion of non-assenting creditors. This case, however, contains a *dictum* to the effect that, in the absence of such provision, the assignment would be valid. In the same volume, and only a few pages later, comes the case of *Collier v. Davis*, 47 Ark. 367, wherein the assignment, though it was a copy of the one which had been upheld in *Clayton v. Johnson*, was declared void, because it failed to make provision for the distribution of any surplus left after the payment of creditors who should release.

In that case *Clayton v. Johnson*, is expressly overruled, and the following statement is made with regard to the current of authority:

> "In New York, and perhaps in every other jurisdiction where the question has arisen, except in those mentioned in *Clayton v. Johnson*, the invalidity of assignments stipulating for a release as a condition of receiving any benefit under the assignment is established. And it is a *remarkable fact* that, in an opinion prepared by the late Chief Justice, the drift of the decisions on this subject in the several States has been totally misapprehended."

The last mentioned case was followed by *Wolf v. Gray*, 53 Ark. 75, in which the three prior cases are considered at some length, and it was held that *Clayton v. Johnson*, was intended to be overruled only, when the assignment fails to give to the non-preferred creditors the surplus remaining after the satisfaction of the preferred debts. While this is now the settled law of the State of Arkansas, it cannot be said to have been so prior to the decision of *Wolf v. Gray*. That decision was rendered on March 22, 1890, which was more than three months after the introduction in Congress of the act of May 2, 1890, for the enlargement of the jurisdiction of the United States Court in Indian Territory, and little more than one month prior to the final passage of the act; nor was the decision reported until a considerable time thereafter.

Under such circumstances these rulings would not have been obligatory upon the Federal courts, even if they had resulted from the construction of a local statute adopted by Congress in the Act of 1890. But no such claim can be maintained. These rulings do not in any way depend upon any statute local or peculiar to Arkansas.

And here we call attention to the following remarks of the Circuit Court of Appeals in this case:

> "The Act of Congress adopted and put in force in the Indian Territory the Arkansas statutes, including the statute on the subject of assignments for the benefit of creditors, and we have uniformly held that it was the duty of this court, and the Courts in the Indian Territory, to follow the construction given to those statutes by the Supreme Court of Arkansas." (Printed Record, p. 74.)

The inference to be drawn from these remarks is that the question at law is controlled or affected by some statutory provisions of Arkansas with reference to assignments for the benefit of creditors. We cannot understand how the Circuit Court of Appeals fell into the error of making this assumption; we have already stated that it is not warranted.

The utmost that can be claimed is that the invalidity of the requirement for a release in an assignment for the benefit of creditors rests upon the statute of fraudulent conveyances known as 13 Eliz. ch. 5; (*Burrill on Assignments*, 6th Ed.; sec. 11; *ibid.* sec. 295, *et seq.*; *Bump on Fraudulent Conveyances*, 4th Ed., sec. 12 *et seq.*; *Amer. & Eng. Enc. of Law*, 2d Ed. Vol. 14, p. 222); and that this statute together with the common law became operative in the Indian Territory through the adoption of Chapter 20, Mansfield's Digest of the Statutes of Arkansas, by Congress in the Act of May 2, 1890. However, this claim could not avail the defendants in error, since the statute of 13 Eliz. was under consideration and applied in the various decisions upon which we have hereinbefore relied, and since it is well settled that the adoption of a statute does not carry with it the construction received in the State from which it is taken, if such construction is at variance with that which the same statute has, prior to its adoption, re-

ceived in other jurisdictions. *Conlan v. Doull*, 133 U. S. 216; *Whitney v. Fox*, 166 U. S. 637.

And even that claim would not be strictly accurate; for the statute of 13 Eliz. is merely declaratory of the common law, which in itself denounces and avoids conveyances made with the intent to defraud, hinder or delay creditors (*Wait on Fraudulent Conveyances*, sec. 16, p. 36, *et seq.*; *Burrill on Assignments*, 6th ed., sec. 11, p. 20; *Bump on Fraudulent Conveyances*, 4th ed., sec. 12, *et seq.*; *Bigelow's Law of Fraud*, Vol. 2, p. 24, *et seq.*; *14 Amer. & Eng. Enc. of Law*, 2 ed. pp. 222, 223.

Indeed, this Court has declared, in the extract hereinbefore taken from the case of *Security Trust Co. v. Dodd*, 173 U. S. 633, that an assignment which requires releases from creditors "would have been in many, perhaps in most, of the States *void at common law.*"

The question of the validity of the assignment in controversy, therefore, depends solely upon the common law; and it would do no credit to our own discrimination, if we were to undertake to argue that the Federal courts are free to exercise and follow their own judgment in the administration of the common law in Federal territory with reference to transactions arising therein. To say that they are at liberty so to do would not be sufficiently explicit. Their duty requires them to do this, even when exercising their functions in the States, and when their judgment leads them to conclusions in conflict with the rulings of the courts of the State in which they are sitting. *Chicago v. Robbins*, 67 U. S. 418; *Merrick v. Railroad*, 107 U. S. 102; *Baltimore etc. Ry. Co. v. Baugh*, 149 U. S. 368.

Every individuality has its own responsibilities; and these it should not shirk at the expense of its identity. The higher its function or sphere of ac-

tion, the greater its responsibility; and no responsibility with respect to independence of judgment and action is greater than that of the judiciary.

II.

The deed of assignment, even if otherwise valid, did not take effect as against the attachment of the plaintiffs in error, since there was no evidence of any acceptance of it, or assent to it, by any creditors.

We have already in our foregoing statement (*ante* page 4) alluded to the fact that it does not anywhere appear that any creditor executed the release required by the deed of assignment under which the interpleader C. M. King claims, or that any creditor in any manner accepted or assented to that deed.

Under these circumstances the interpleader was not entitled to recover. Although the authorities are conflicting, we are willing to concede that consent would have been presumed, and therefore need not have been proven, if the deed of assignment had been unconditionally in favor of the creditors for whose benefit it was made. But it was not, since it required a release; and no presumption will lie that creditors were willing to release and accepted the assignment with that requirement. It is well settled that such an assignment only overrides or takes priority over a subsequent attachment of the assigned property, in so far as it was accepted or assented to prior to the attachment.

McCain v. Pickens, 32 Ark. 399;
Halsey v. Whitney, 4 Mason, 206;
Swearingen v. Slicer, 5 Mo. 241;
Drake v. Rogers, 6 Mo. 317;
Jewett v. Barnard, 6 Maine, 381;
Todd v. Beckham, 11 Maine, 41;
Burrill on Assignments, 6 Ed., p. 341.

The question, whether the release shall be given, is one which every creditor is entitled to decide for himself; and courts are not warranted in presuming in advance what his decision will be.

> "The assent of creditors to an assignment, apparently for their benefit, will be presumed; but where the assignment is conditional that the assignor shall be released, assent will not be presumed." (Syllabus of McCain v. Pickens, *supra*.)

This authority would, in itself, suffice if the decisions of the Supreme Court of Arkansas were controlling. In this instance, however, all or nearly all authority is in accord.

> "So, where there are conditions in an assignment, as, for instance, that the creditors shall release their debts, the presumption of assent does not arise, because it involves a question of discretion upon which different minds may draw different conclusions." Burrill on Assignments, 6 ed., p. 341.

To the same effect are all the decisions cited by us in support of our present contention.

III.

The Judgment of the Trial Court in This Cause Was Erroneous.

The plaintiffs in error are entitled to complain of the judgment of the trial court, among other reasons, because it includes persons who are not parties to the cause, and, further, because it gave to the interpleader cumulative rights without limiting him to one satisfaction.

The first of these grounds of complaint arises from the fact, that the trial court undertook to render a personal judgment for seventy-nine hundred dollars not only against the plaintiffs in error, J. M. Robinson & Co., but also against the other attaching cred-

itors. (Printed Record, p. 22.) What jurisdiction had the court of these other creditors in the cause at bar? True, they had entered into a stipulation, each for himself, to abide the final result of this cause, but that did not warrant a judgment against them in this cause, and this, moreover, when the stipulation on its face showed a contrary intention. (Printed Record, pp. 21, 22.)

As to the second of these grounds we have already in our statement sufficiently called the attention of the Court to the fact that the judgment, while affording three remedies, fails to provide that moneys received under one of these remedies should operate as a satisfaction of either of the others; as, for instance, that the refunding by creditors of amounts previously collected should operate *pro tanto* as a satisfaction of the personal judgment.

But, while the judgment appears to us to be subject to the foregoing objections, we do not lay as great stress upon them as we otherwise might, because the need for their consideration is obviated by the existence of a third and more important objection, which is, that the personal judgment which the trial court rendered against the plaintiffs in error (as well as other attaching creditors) for the value of the goods in controversy, the same being for seventy-nine hundred dollars, was erroneous and even beyond the powers of the Court.

The interplea in this cause arose and is provided for by sections 356 and 358 of Mansfield's Digest of the Laws of Arkansas, which relate to the subject of attachment. These provisions read:

> "Sec. 356. Any person may, before the sale of any attached property, or before the payment to the plaintiff of the proceeds thereof, or of any attached debt, present his complaint, verified by oath, to the court disputing the validity of the attachment, or stating a

claim to the property, or an interest in or lien on it under any other attachment or otherwise, and setting forth the facts upon which such claim is founded, and his claim shall be investigated."

"Sec. 358. The court may hear the proof, or may order a reference to a commissioner, or may impanel a jury to inquire into the facts. If it is found that the claimant has a title to, a lien on or any interest in such property, the court shall make such order as may be necessary to protect his rights. The cost of this proceeding shall be paid by either party at the discretion of the court."

Now, it will be borne in mind that, when the property in controversy was levied upon, the interpleader had his common law action of trover or conversion against the parties connected with the levy, and he also had the right, if he elected to exercise it, to possess himself of the property itself by action in replevin. To these remedies the statutory provisions above referred to added another, which was, the right to go into the court which was in the custody of the property and ask the court for a restoration of it, or, in case of its sale by the court, to the payment of its proceeds in its place. But this third remedy in no wise took the place of the right of personal action in trover or conversion; and, being a purely statutory remedy, it extended no further, and could not operate otherwise, than the statute itself provided. There being no provision by statute for personal judgment, it follows that none could be rendered.

The very question, which we are now considering, came before the Circuit Court of Appeals for the Eighth Circuit in *Swift & Co. v. Russell*, 38 C. C. A. 259; same case 97 Fed. Rep. 443; and it was there determined in accordance with the views above expressed, and the claim which we are now advancing.

The decision is by Sanborn, Judge, and its effect sufficiently appears from the following extract:

> "Consequently the nature of the proceeding by interplea is fixed, and the extent of the remedy granted must be determined, by these sections of the statutes. When these are carefully read, the attention is sharply challenged by the facts, that the interplea may be interposed before the sale of the attached property, or before its proceeds are paid over to the plaintiff, but not after such payment; that the claimant must set forth the facts on which his claim to the property or its proceeds is founded, but nothing more; that the court may find whether or not the claimant has a title to, a lien upon, or an interest in the property, but nothing else; and that it may make such order as may be necessary to protect his rights in the property or its proceeds, and may direct which party to the proceeding shall pay the costs, but it may grant no other relief. There is no provision in these sections for an assessment of damages for the appraisal of the property, or for the recovery of its value. The proceeding authorized by them is not an action for the value of the property, or for damages for its taking. It is not an action for the recovery of the property. Indeed, it is not an action at all. It is more in the nature of a proceeding *in rem*. **The extent of the adjudication, which it authorizes, is a determination of the rights and interests of the plaintiff and the interpleader in the attached property or its proceeds in the hands of the marshal, and the limit of the remedy it provides is the delivery of that property, or the payment of its proceeds, to the party whom the court finds to be entitled to them, and the assessment of the costs.** '*Expressio unius est exclusio alterius*,' **and a finding and recovery of the value of the property attached are not mentioned, and are, therefore excluded from the adjudication and from the remedy which these sections of the statutes permit.**"

The same ruling has been made by the Supreme Court of Arkansas in

Jefferson v. Dunavant, 53 Ark. 133;
Fly v. Grieb's Adm'r, 62 Ark. 209.

In the former of these authories (*Jefferson v. Dunavant*) the *syllabus* reads as follows:

> "The statute which authorizes the intervention of a claimant of property attached (Mansf. Dig., section 358) contemplates only a trial of the right of property; damages for detention of the property are recoverable in a separate action."

In *Fly v. Grieb's Adm'r* the jury found, and the Court rendered judgment for, the value of the property attached, as was done in the case at bar, but this was held to be erroneous, the Court saying that "the interpleader was entitled to the proceeds of the attached property in the hands of the sheriff, the same having arisen from its previous sale, and that it was error for the Court to render a judgment against plaintiffs for the property or its value."

And the Court add:

> "If the amount did not equal the true value of the property, or if the interpleader was damaged otherwise by unlawful taking or detention of the same, he would have to seek redress in another proceeding. *The issue on the interplea is for the property itself; or, if it has been sold, for its proceeds.*"

The foregoing decisions being direct and explicit, and they being founded upon clear reasoning and principle, recourse to further authority seems unnecessary; we are also somewhat loth to refer to the decisions in other jurisdictions, because it is apparent that in referring to them care must be taken to see that they are based upon similar statutory provision, in order to insure their applicability. Yet, we find in some of the other States statutes so similar and decisions so pointed, that we can not refrain from briefly alluding to them.

The case of *Jennings v. Hoppe*, 44 Iowa, 207, presents a statute and a decision in precise accord with those hereinbefore quoted. The purport of the statute

is set forth in the decision itself at sufficient length to show that it is a copy, or almost a verbal copy, of the statute of Arkansas; and the case presented the identical question involved in *Jefferson v. Dunavant, supra*, namely, whether, after a recovery on an interplea in an attachment proceeding, suit would lie for damages to the property which had been in controversy. The Court held that this could be done *on the ground that no recovery for damages could have been had in the interpleader proceedings*, saying:

> "The only question that could be determined was his right or title to the property; nothing more is contemplated. * * * This proceeding of intervention is purely statutory, and in the absence of a provision expressly, or by necessary implication, allowing damages to be recovered, we are at a loss to know upon what principle such a claim can be based."

In the State of Missouri provision is made by statute for interplea or intervention by a claimant of the attached property, the provision being:

> "Any person claiming property, money, effects or credits attached, may interplead in the cause, verifying the same by affidavit, and issues may be made upon such interplea, and shall be tried as like issues between plaintiff and defendant without any unnecessary delay." (Revised Statutes of Missouri 1889, Sec. 372.)

And under this statute it is the settled law of the State, that no personal judgment can be rendered against the attachment plaintiff for the value of the attached property.

> Mills v. Thomson, 61 Mo. 415;
> Hewson v. Tootle, 72 Mo. 632;
> Williams v. Braden, 57 Mo. App. 317.

In the first of these cases, (*Mills v. Thomson*), the verdict of the jury found the value of the property attached and the damages thereto. With respect to this finding the Court said:

"This verdict was a *mere nullity*, and the Court should have set it aside."

In *Hewson v. Tootle* the Court held, as stated in the *syllabi* of the case:

"Upon the trial of an interplea and attachment, the verdict must be responsive to the issue presented, viz: whether the property attached was the property of the interpleader. A mere money verdict in favor of the interpleader will not do."

The effect of the case of *Williams v. Braden* is shown by the following extract from it:

"The only issue between the plaintiff and the interpleader was whether or not the corn was the property of the interpleader. This, and nothing more, was for decision in the controversy between the attaching plaintiff and the interpleader Hicks. The trial court erred in rendering a money judgment, as in a case of trespass, against the plaintiff."

Indeed, we find a decision as old as *McClain v. Douglass*, 6 Ired. Law (N. C.) 232, to the same effect as the authorities hereinbefore quoted, though it is to be added that the statute involved in that case is somewhat more specific than that controlling the decisions in Arkansas, Iowa and Missouri. The principle of the case, however, is the same. The court states:

"The only judgment the court is authorized to pronounce is upon the title, and the costs incurred in bringing the interplea. A rightful verdict is the answer of a jury to the court concerning the matters of fact committed to their trial and examination. Whatever they find beyond this is impertinent and immaterial and to be rejected."

We submit that the foregoing authorities are controlling, and dispose of the question under consideration.

Respectfully submitted,

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